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Attorneys Beware: Unprecedented Law Changing in Nebraska. Summary Judgment, Affirmative Defenses and *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000)

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Note*

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I. INTRODUCTION

City State Bank v. Holstine[1] fundamentally changed summary judgment law in Nebraska. The *Holstine* decision requires a moving plaintiff to show no genuine issues of material fact exist on the defendant's affirmative defenses.[2] This change has gone seemingly unnoticed by many attorneys and scholars throughout the state. Despite

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1. 260 Neb. 578, 618 N.W.2d 704 (2000).
2. *Id.* at 584, 618 N.W.2d at 709.

the lack of notoriety, practitioners should not overlook the dangerous precedent the Nebraska Supreme Court has established.

This Note outlines the change *Holstine* had on the law and the implications the decision will have on future litigation. Part II presents an overview of summary judgment law in Nebraska and the *Holstine* decision. Part III addresses Nebraska law prior to *Holstine* and then analyzes the authority cited in the *Holstine* decision. Part III also considers the policy implications of the decision and concludes with a discussion of the approaches taken by courts in other jurisdictions. Overall, this Note demonstrates the *Holstine* decision will have detrimental effects on plaintiffs moving for summary judgment in Nebraska.

II. BACKGROUND

A. Overview of Summary Judgment in Nebraska

A brief overview of summary judgment law in Nebraska, with special attention focused on the burden of proof, is necessary to best understand the underlying situation presented in *Holstine*. The purpose of summary judgment is to "pierce sham pleadings and dispose of cases where there is no genuine claim or defense."[3] The general procedure and requirements for a summary judgment motion are found in the Nebraska statutes.[4] Section 25-1332 provides that a summary judgment motion should be granted when there is not a genuine issue of material fact.[5] This statute also states pleadings and other supporting documents presented by the parties are used by the court to determine if a genuine issue exists on a material fact.[6] If there is not a genuine factual issue, the party that moved for summary judgment is entitled to judgment as a matter of law.[7] Therefore, summary judgment serves as a means to look beyond the allegations pled by the

3. Draemel v. Rufenacht, Bromagen & Hertz, Inc., 223 Neb. 645, 649, 395 N.W.2d 759, 763 (1986); *accord*, Gall v. Great W. Sugar Co., 219 Neb. 354, 355, 363 N.W.2d 373, 375 (1985); Witherspoon v. Sides Constr. Co., 219 Neb. 117, 119, 362 N.W.2d 35, 39 (1985); Cummings v. Curtiss, 219 Neb. 106, 108, 361 N.W.2d 508, 510 (1985).

4. NEB. REV. STAT. §§ 25-1330 to 1336 (Reissue 1995, Cum. Supp. 2000 & Supp. 2001).

5. NEB. REV. STAT. § 25-1332 (Reissue 1995).

6. Id.; *see also* Keefe v. Glasford's Enters., Inc. 248 Neb. 64, 69-70, 532 N.W.2d 626, 630 (1995) (noting summary judgment motions are granted only if "the pleadings, depositions, admissions, stipulations, and affidavits" admitted to the record show there is no issue of material fact).

7. *E.g.*, Dvorak v. Bunge Corp., 256 Neb. 341, 348, 590 N.W.2d 682, 687 (1999); Foreman v. AS Mid-America, Inc., 255 Neb. 323, 326, 586 N.W.2d 290, 295 (1998); Deprez v. Cont'l W. Ins. Co., 255 Neb. 381, 384, 584 N.W.2d 805, 807 (1998); Kozicki v. Dragon, 255 Neb. 248, 251, 583 N.W.2d 336, 339 (1998).

parties. If a genuine issue of fact does not exist, summary judgment ensures the significant expense and time of trial are prevented.[8]

Initially, the moving party has the burden to show that there is no genuine issue of material fact.[9] The movant "must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law."[10] In order to meet this burden, a movant must make a prima facie case for summary judgment "by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence [remains] uncontroverted at trial."[11]

While this initial burden is still on the movant, the nonmovant's inaction can result in a concession to certain issues. If a nonmovant does not disagree with or challenge a fact in a movant's affidavit, the court assumes that particular fact is not in dispute.[12] In other words, failure of a nonmovant to contradict a particular fact is viewed by the court as a concession. However, if an issue of fact depends on a witness' credibility, then summary judgment will not be granted and the case must proceed to trial.[13] Once the movant makes a prima facie summary judgment case, the burden then shifts to the nonmovant.[14] The nonmovant must then show that there is a genuine issue of material fact that makes judgment as a matter of law improper.[15] If the

8. *See* Moore v. Am. Charter Fed. Sav. & Loan Ass'n, 219 Neb. 793, 794, 336 N.W.2d 436, 437 (1985).

9. Gitschel v. Sauer, 212 Neb. 454, 456, 323 N.W.2d 93, 95 (1982) ("The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled."); *accord*, Knudsen v. Mut. of Omaha Ins. Co., 257 Neb. 912, 916, 601 N.W.2d 725, 728 (1999); Kaiser v. Millard Lumber, Inc., 255 Neb. 943, 949, 587 N.W.2d 875, 880 (1999); Krohn v. Gardner, 248 Neb. 210, 212, 533 N.W.2d 95, 97 (1995).

10. Stiver v. Allsup, Inc., 255 Neb. 687, 693, 587 N.W.2d 77, 81 (1999); *accord*, Boyle v. Welsh, 256 Neb. 118, 125, 589 N.W.2d 118, 124 (1999); Deprez v. Cont'l W. Ins. Co., 255 Neb. 381, 384, 584 N.W.2d 805, 807 (1998).

11. Iwanski v. Gomes, 259 Neb. 632, 639, 611 N.W.2d 607, 612 (2000); *accord*, Durkan v. Vaughan, 259 Neb. 288, 291, 609 N.W.2d 358, 361 (2000); Herman Bros., Inc. v. Great W. Cas. Co., 255 Neb. 88, 93, 582 N.W.2d 328, 332 (1998).

12. Raskey v. Michelin Tire Corp., 223 Neb. 520, 528, 391 N.W.2d 123, 128 (1986); *see also* Vergara v. Lopez-Vasquez, 1 Neb. Ct. App. 1141, 1150, 510 N.W.2d 550, 555 (1993) (holding movant "produced sufficient evidence to demonstrate that he was entitled to judgment as a matter of law because the evidence presented for summary judgment remained uncontroverted").

13. *See* Bates v. Design of the Times, Inc., 261 Neb. 332, 336-37, 622 N.W.2d 684, 687 (2001); Medley v. Davis, 247 Neb. 611, 619, 529 N.W.2d 58, 64 (1995); Armstrong v. Armstrong, 192 Neb. 11, 16, 218 N.W.2d 541, 544 (1974).

14. *E.g.*, Durkan v. Vaughan, 259 Neb. 288, 291, 609 N.W.2d 358, 361 (2000); Herman Bros., Inc. v. Great W. Cas. Co., 255 Neb. 88, 93, 582 N.W.2d 328, 332 (1998); Healy v. Langdon, 245 Neb. 1, 4, 511 N.W.2d 498, 501 (1994); Universal Assurors Life Ins. Co. v. Hohnstein, 243 Neb. 359, 366, 500 N.W.2d 811, 816 (1993).

15. *E.g.*, Huff v. Swartz, 258 Neb. 820, 831, 606 N.W.2d 461, 470 (2000); Bargman v. Soll Oil Co., 253 Neb. 1018, 1027, 574 N.W.2d 478, 485 (1998); Popple v. Rose,

nonmovant fails to meet its burden of showing a factual issue exists, summary judgment will be granted in the movant's favor.[16]

The nonmovant has an advantage throughout the process of a summary judgment motion because the court looks at the evidence in a light most favorable to the nonmovant.[17] Since *Holstine* was an appeal, it is also important to note that on appeal, "a court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence."[18] Thus, the court gives the nonmoving party a benefit not available to the moving party in determining if a genuine issue of material fact exists.

B. *City State Bank v. Holstine*

Holstine involved a fairly straightforward case between a bank and a co-signer on a loan.[19] City State Bank ("Bank"), located in Clay County, Nebraska, issued a loan for over $100,000 to William B. Gorman, for which Ronald R. Holstine cosigned a promissory note. Less than a year after the note was signed, it fell into default by reason of nonpayment. The Bank then sued Holstine in the District Court of Clay County seeking to recover the amount of the loan and interest. Holstine, a Colorado resident, answered with affirmative defenses; he claimed, among other things, that he was fraudulently induced by the Bank to cosign and that the note contained material misrepresentations.[20] Holstine made several specific allegations in his affirmative defense of fraudulent misrepresentation, such as the Bank did not tell him the purpose of the promissory note was to hold Holstine liable for debts from Gorman's partnership.[21]

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254 Neb. 1, 3, 573 N.W.2d 765, 768 (1998); Molt v. Lindsay Mfg. Co., 248 Neb. 81, 88, 532 N.W.2d 11, 16 (1995).

16. *See* Battle Creek State Bank v. Preusker, 253 Neb. 502, 513, 571 N.W.2d 294, 301-02 (1997).
17. *See* Knudsen v. Mut. of Omaha Ins. Co., 257 Neb. 912, 913, 601 N.W.2d 725, 727 (1999); Stiver v. Allsup, Inc., 255 Neb. 687, 693, 587 N.W.2d 77 (1998); Deprez v. Cont'l W. Ins. Co., 255 Neb. 381, 384, 584 N.W.2d 805, 807 (1998).
18. Iwanski v. Gomes, 259 Neb. 632, 636, 611 N.W.2d 607, 611 (2000); *accord*, Herman Bros., Inc. v. Great W. Cas. Co., 255 Neb. 88, 90, 582 N.W.2d 328, 330 (1998); Swoboda v. Mercer Mgmt. Co., 251 Neb. 347, 348, 557 N.W.2d 629, 630 (1997).
19. 260 Neb. at 578, 618 N.W.2d at 706.
20. The other four affirmative defenses that Holstine asserted were: the note did not have sufficient consideration, his obligation changed because the Bank did not get the proper insurance on Gorman, the Bank did not give Holstine notice there would not be insurance, and the Bank conspired to fraudulently induce him to agree to cosign. *Id.* at 580, 618 N.W.2d at 706-07.
21. The other specific misrepresentations made by Holstine were that the Bank schemed to set up the loan so the money would go to Gorman's partner, who would pay the Bank and work the transaction so that the Bank's past financial problems with Gorman would be minimized. Also, he alleged that the Bank did

The Bank denied the allegations in the affirmative defenses and moved for summary judgment. At the hearing there were exhibits entered onto the record,[22] and summary judgment was granted in the Bank's favor.[23] Holstine proceeded to move for a new trial, which was denied.[24] Holstine then appealed to the Nebraska Supreme Court. He claimed it was error to grant summary judgment in favor of the Bank, because his affirmative defenses raised genuine issues of material fact.

The Nebraska Supreme Court noted that the Bank did not produce evidence on Holstine's affirmative defenses.[25] The court then briefly outlined summary judgment procedure by citing various Nebraska cases.[26] According to the court, the "posture of the case" required the Bank, in showing they were entitled to judgment as a matter of law, to introduce evidence showing Holstine's affirmative defenses did not create a genuine issue of material fact.[27] The court held, in reference to Holstine's affirmative defenses, that the Bank "failed to meet its burden as the party moving for summary judgment to produce evidence which, if uncontroverted, would entitle it to judgment as a matter of law."[28] On that basis, the court held Holstine did not have the burden shifted to him.[29] Concluding that there was a genuine issue of fact due to the affirmative defenses raised in Holstine's answer, the court reversed the judgment for the Bank and remanded the case.[30]

III. ANALYSIS

In *Holstine*, the Nebraska Supreme Court changed summary judgment law. The decision changed the burden of proof on plaintiffs moving for summary judgment against defendants raising affirmative

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not disclose the relationship problems in Gorman's partnership, the partnership's inability to get more money without Holstine, and that the Bank stated there would never be a time Holstine would be liable to pay on the note. *Id.* at 581, 618 N.W.2d at 707.

22. The Bank offered exhibits into the record that are evidenced in the bill of exceptions. It was stipulated between the Bank and Holstine that Holstine mailed one exhibit two weeks after the summary judgment hearing and three more in a time period starting around a month after the hearing and ending almost four months later. *Id.* at 581, 618 N.W.2d at 707.
23. *Id.*
24. *Id.* at 581-82, 618 N.W.2d at 707.
25. *Id.* at 583, 618 N.W.2d at 709.
26. Cass Const. Co. v. Brennan, 222 Neb. 69, 382 N.W.2d 313 (1986); Moore v. Am. Charter Fed. Sav. & Loan Ass'n, 219 Neb. 793, 366 N.W.2d 436 (1985).
27. *Holstine*, 260 Neb. at 584, 618 N.W.2d at 709.
28. *Id.*
29. *Id.* at 585, 618 N.W.2d at 709.
30. *Id.* at 585, 618 N.W.2d at 709-10. The court also stated "[w]e conclude that the Bank failed to show that no genuine issues of material fact existed regarding the affirmative defenses pled by Holstine and that therefore, the district court erred in granting summary judgment in favor of the Bank." *Id.*

defenses. In order to fully understand the *Holstine* decision, four points must be considered. First, *Holstine* is inconsistent with several previous cases. Second, the cases cited by the court in *Holstine* do not provide a strong basis for the court's decision. Third, this decision creates policy concerns because it will increase inefficiencies in future litigation and will lead to frivolous lawsuits. Finally, the approaches other jurisdictions take with respect to this procedural situation are important in understanding the *Holstine* decision.

A. Previous Nebraska Cases

Holstine fundamentally changed the standard established in previous cases wherein the plaintiff moved for summary judgment against a defendant claiming an affirmative defense. In *Holstine*, the court held the plaintiff had the initial burden to show the defendant's affirmative defenses did not present an issue of fact.[31] The cases that addressed this type of summary judgment situation prior to *Holstine* took a distinctively different approach. These cases put the initial burden on the defendant to show the affirmative defense presented an issue of fact.[32] Three cases best illustrate how *Holstine* changed Nebraska law: *Bender v. James*,[33] *Farmers Cooperative Exchange v. Demerath Land Co.*,[34] and *Talle v. Nebraska Department of Social Services*.[35]

In *Bender*, the plaintiff brought suit to quiet title.[36] The defendant claimed ownership by adverse possession, but the plaintiff held record ownership. The defendant appealed the district court's summary judgment ruling in favor of the plaintiff. In affirming summary judgment for the plaintiff, the Nebraska Supreme Court held:

> The plaintiffs' evidence establishes undisputed record title in themselves, and therefore a prima facie showing for summary judgment has been established. The defendant has raised as an affirmative defense the claim of adverse possession. The defendant has failed to offer competent evidence that there is a genuine issue as to that fact. . . . Defendant's claim of adverse possession is without merit.[37]

Thus, in *Bender* the defendant was assigned the burden to present issues of fact on the affirmative defense even where the plaintiff moved for summary judgment.

In *Farmers*, the plaintiff sued to collect money due on a purchase.[38] As an affirmative defense, the defendant claimed the goods did not

31. *Id.* at 584-85, 618 N.W.2d at 709.
32. *See* cases cited *infra* notes 33-35.
33. 212 Neb. 77, 321 N.W.2d 436 (1982).
34. No. A-93-993, 1995 WL 382739 (Neb. Ct. App. June 27, 1995).
35. 249 Neb. 20, 541 N.W.2d 30 (1995).
36. 212 Neb. at 78, 321 N.W.2d at 438.
37. *Id.* at 82, 321 N.W.2d at 440 (citation omitted).
38. 1995 WL 382739.

meet the implied warranty of merchantability. The plaintiff moved for partial summary judgment, claiming the alleged affirmative defenses did not "establish the facts that are the basis of the affirmative defenses."[39] The district court found the affirmative defense constituted a conclusion of law, as opposed to asserting facts that supported the conclusion.[40]

On the defendant's appeal, the court held the plaintiff presented "prima facie evidence" that there was no genuine issue of material fact.[41] The plaintiff only presented evidence on its claim, not on the defendant's affirmative defense. The court stated the burden then shifted to the defendant to dispute the plaintiff's "prima facie case."[42] The plaintiff did not address the defendant's affirmative defense of implied warranty of merchantability. Thus, *Farmers* clearly placed the burden on the defendant to present issues of fact on an affirmative defense when the plaintiff moved for summary judgment.

In *Talle*, the plaintiff sued for negligence, and the defendant claimed assumption of the risk as an affirmative defense.[43] The Nebraska Supreme Court affirmed summary judgment in favor of the plaintiff.[44] The court noted a defendant carries the burden of establishing the elements before questions of fact on assumption of the risk can go to a jury.[45] While the opinion did not specify which party presented the evidence, the court held the affirmative defense could not be submitted to the jury as a question of fact.[46] The defendant did not meet its burden of showing the plaintiff understood there was a danger, an element of assumption of the risk.[47] In other words, the court held the defendant did not meet its burden because it failed to show the affirmative defense as pled raised an issue of fact.[48]

In all three cases, the plaintiffs, like the Bank in *Holstine*, moved for summary judgment against a defendant asserting an affirmative defense. In the cases prior to *Holstine*, the defendants were assigned the burden to present evidence showing issues of fact existed on the affirmative defenses. The plaintiffs only had to present evidence on their own claims in order to obtain summary judgment. Then, after

39. *Id.* at *2.
40. *Id.*
41. *Id.* at *5.
42. *Id.*
43. 249 Neb. at 22-24, 541 N.W.2d at 32-33.
44. *Id.* at 25, 541 N.W.2d at 34.
45. *Id.* at 23-24, 541 N.W.2d at 33-34.
46. *Id.* at 25, 541 N.W.2d at 34.
47. *Id.* While the majority affirmed summary judgment for the plaintiff, the dissent felt the majority decided a question of fact, rather than deciding the existence of a question of fact. *Id.* at 27, 541 N.W.2d at 35 (Caporale, J., dissenting in part).
48. *See also* Anderzhon/Architects, Inc. v. 57 Oxbow II P'ship, 250 Neb. 768, 553 N.W.2d 157 (1996) (involving plaintiff who disproved defendant's affirmative defenses by proving her own prima facie case for summary judgment).

the plaintiffs produced prima facie evidence on their own claims, the defendants were obligated to show their affirmative defenses created an issue of fact. *Holstine* directly contradicts these cases. The Bank in *Holstine* was denied summary judgment because it failed to produce evidence showing Holstine's affirmative defenses did not raise an issue of fact.[49] Therefore, the *Holstine* decision implicitly overruled these cases and declared a new standard for summary judgment in Nebraska.

The Nebraska Supreme Court's decision in *Holstine* created inconsistent case law by failing to overrule contradictory cases like those discussed above. This error by the court will cause problems in the future because both parties in a summary judgment motion will be able to cite authority in their favor. Plaintiffs can cite cases like *Bender*, *Farmers*, and *Talle* to show the defendant has the burden to present issues of fact on an affirmative defense. Defendants need only look to *Holstine* to argue the plaintiff is charged with this burden. Indeed, the *Holstine* decision left uncertainty that will impact attorneys and courts throughout Nebraska.

B. The Authority in the Decision

The authority relied upon throughout the court's analysis in *Holstine* is inadequate to support shifting the burden of producing evidence on the defendant's affirmative defenses to a plaintiff moving for summary judgment. There are two flaws in the analysis of the decision. First, the bulk of the court's analysis involved parties in a different procedural position than the parties in *Holstine*. Second, the court misconstrued three cases it relied on in its analysis. In addition, the briefs of the parties illustrate how the court's interpretation of prior Nebraska law was surprising and unanticipated.

First, the court's analysis in *Holstine* relied on cases involving a different procedural posture. In Nebraska, most cases involving affirmative defenses and summary judgment make their way to the Nebraska Court of Appeals and the Nebraska Supreme Court when the defendant, rather than the plaintiff, is the party moving for summary judgment.[50] Defendants who raise an affirmative defense and move for summary judgment do not have to offer evidence on elements of the plaintiff's claim.[51] If the defendant presents evidence showing

49. 260 Neb. at 584-85, 618 N.W.2d at 709.

50. *See, e.g.*, Morrison Enter. v. Aetna Cas. & Sur. Co., 260 Neb. 634, 619 N.W.2d 432 (2000) (involving defendant who asserted affirmative defenses and went on to move for summary judgment); Keefe v. Glasford's Enter., Inc., 248 Neb. 64, 532 N.W.2d 626 (1995) (involving defendant who moved for summary judgment after asserting affirmative defenses in answer).

51. *See* Vergara v. Lopez-Vasque, 1 Neb. Ct. App. 1141, 510 N.W.2d 550 (1993).

there is no issue of fact on the affirmative defense, the defendant has met its burden.[52]

In many of the cases the court relied on in *Holstine*, the defendant was the party moving for summary judgment. Of the four cases the court cited in its analysis, only one involved a plaintiff moving for summary judgment.[53] Further, the only case with a moving plaintiff was cited as authority for the notion that issues are framed by the pleadings.[54] It was not cited as authority for the Bank's responsibility to produce evidence refuting Holstine's affirmative defenses.[55]

Second, the analysis in the *Holstine* decision misconstrued three cases. First, the court in *Holstine* relied on *Cass Construction Co. v. Brennan*.[56] The court, citing *Brennan*, held that in order to have the burden shifted to Holstine, the Bank was required to produce evidence on Holstine's affirmative defenses to the extent sufficient to show there was no genuine issue of material fact.[57] However, *Brennan* stated that the movant "*may* discharge" this burden by showing the nonmovant could not produce evidence contradicting the movant's position.[58] *Brennan* does not state that this is the only or required way to discharge the burden.[59] Thus, *Brennan* is not sufficient authority to unconditionally require a plaintiff moving for summary judgment to essentially disprove the alleged affirmative defenses.

The court also relied on *Moore v. American Charter Federal Savings & Loan Ass'n*.[60] In *Moore*, the defendants, after making specific denials without raising an affirmative defense, moved for summary judgment.[61] The court in *Moore* considered only the pleadings, along with some documents the plaintiff had attached to her pleadings, in granting defendants' motion for summary judgment.[62] Throughout the analysis in *Moore,* the court did not address affirmative defenses. The *Moore* decision did note that the moving "party must . . . produce enough evidence to demonstrate his entitlement to a judgment if the

52. *See id.* at 1150, 510 N.W.2d at 555.
53. Sherrets, Smith & Gardner v. MJ Optical, Inc., 259 Neb. 424, 610 N.W.2d 413 (2000) (plaintiffs moved for summary judgment); Neb. Popcorn, Inc. v. Wing, 258 Neb. 60, 602 N.W.2d 18 (1999) (defendant moved for summary judgment); Cass Constr. Co. v. Brennan, 222 Neb. 69, 382 N.W.2d 313 (1986) (defendant moved for summary judgment); Moore v. Am. Charter Fed. Sav. & Loan Ass'n, 219 Neb. 793, 366 N.W.2d 436 (1985) (defendants moved for summary judgment).
54. City State Bank v. Holstine, 260 Neb. 578, 584, 618 N.W.2d 704, 709 (2000).
55. *Id.*
56. 222 Neb. 69, 382 N.W.2d 313 (1986).
57. *Holstine*, 260 Neb. at 584, 618 N.W.2d at 709 (citing Cass Constr. Co. v. Brennan, 222 Neb. 69, 382 N.W.2d 313(1986)).
58. 222 Neb. at 82, 382 N.W.2d at 322.
59. *Id.*
60. 219 Neb. 793, 366 N.W.2d 436 (1985).
61. *Id.* at 796, 366 N.W.2d at 438.
62. *Id.* at 796-97, 366 N.W.2d at 438-39.

evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion."[63] Given the holding in *Moore*, a case in which the evidence was essentially limited to the pleadings and there were no affirmative defenses, it is difficult to determine how the court construed it to require the Bank in *Holstine* to produce evidence on Holstine's affirmative defenses.

Finally, the court in *Holstine* relied on *Nebraska Popcorn, Inc. v. Wing*.[64] In *Nebraska Popcorn*, the defendant asserted the statute of limitations as an affirmative defense. The defendant moved for summary judgment, presenting evidence that showed the statute of limitations had run.[65] After this evidence was presented, the court held the burden shifted to the plaintiff.[66] The plaintiff then had to produce evidence that a genuine issue of fact existed and summary judgment should not have been granted.[67] *Nebraska Popcorn* did not deal with the boundaries of a moving plaintiff's burden of proof when a defendant asserts an affirmative defense. Thus, it does not provide sufficient precedent for placing the burden on the Bank in *Holstine* to produce evidence on the factual allegations in Holstine's affirmative defenses.

Cass, *Moore*, and *Nebraska Popcorn* do not provide precedent for the assertion that a plaintiff moving for summary judgment has to produce evidence on the defendant's affirmative defenses. Yet, the court in *Holstine* cited these cases as authority for requiring the Bank to show Holstine's affirmative defenses did not create an issue of fact. Thus, the cases the court referred to throughout the analysis in the *Holstine* opinion were erroneously used to establish the standard of placing the burden on the plaintiff.

In addition, the briefs indicate neither party anticipated the court's interpretation of these prior cases. The briefs presented by both parties support the notion that neither party knew of Nebraska case law holding the plaintiff responsible for producing evidence on the defendant's affirmative defenses. In Holstine's brief, he argued summary judgment in favor of the Bank should be reversed because the Bank did not present evidence on his affirmative defenses.[68] Yet, Holstine did not provide any authority for the Bank having this burden of proof.[69]

63. *Id.* at 794, 366 N.W.2d at 437.

64. 258 Neb. 60, 602 N.W.2d 18 (1999).

65. *Id.* at 69, 602 N.W.2d at 25.

66. *Id.*

67. *Id.*

68. Brief for Appellant at 3, City State Bank v. Holstine, 260 Neb. 69, 618 N.W.2d 704 (2000) (No. A99-0855) [hereinafter Appellant's Brief].

69. *See id.* at 3-4.

Holstine's brief[70] cited *AMISUB v. Allied Property*,[71] which held "the only affirmative defenses that can prevent such a summary judgment are those which are pled by the defendant."[72] *AMISUB* focused on the fact that defendants cannot use affirmative defenses to preclude summary judgment on a plaintiff's motion if the affirmative defenses were not raised in the pleadings. The case did not focus on the plaintiff's burden to disprove affirmative defenses. Thus, Holstine misconstrued this case and applied it out of context. Holstine pled his affirmative defenses, and since *AMISUB* did not hold that pleading affirmative defenses automatically precludes summary judgment, it is irrelevant.[73]

On the other hand, the Bank's brief made the straightforward assertion that defendants have the burden of proving affirmative defenses.[74] The Bank also noted that Holstine did not produce evidence on his affirmative defenses at the hearing.[75] While the court is not limited to the case law presented in the party briefs, neither brief referenced any solid authority for the Bank having this burden. Even though the cases, as construed by the court, turned out to be very beneficial to Holstine, none were cited in his brief.[76] Thus, it appears that the parties themselves were taken by surprise at the court's interpretation of *Moore*, *Cass*, and *Nebraska Popcorn*.[77]

C. Policy Implications

While the lack of Nebraska authority for the *Holstine* decision is disconcerting, it is not nearly as troublesome as the policy implications of the decision. The policy concerns fall into two general categories. First, the decision will create great inefficiencies in future litigation. Second, there will be an increase in wasteful and frivolous litigation. Together, these policy implications demonstrate the court erred by holding a moving plaintiff has the burden to show there are no issues of material fact on a defendant's affirmative defenses.

First, this decision will lead to great inefficiencies in litigation. It puts plaintiffs in a position where they are obligated to show issues of fact do not exist on affirmative defenses. In order to accomplish this, plaintiffs will have to present more deposition testimony and affida-

70. *Id.* at 5.
71. 6 Neb. Ct. App. 696, 576 N.W.2d 493 (1998).
72. *Id.* at 710, 576 N.W.2d at 503 (holding failure to plead an affirmative defense is a waiver of that defense).
73. The *Holstine* court recognized this by not addressing it in the opinion.
74. Brief for Appellee at 22-23, City State Bank v. Holstine, 260 Neb. 69, 618 N.W.2d 704 (2000) (No. A99-0855) [hereinafter Appellee's Brief].
75. *Id.* at 23.
76. *See* Appellant's Brief, *supra* note 68, at ii. These three cases were not cited in the Bank's brief either. *See* Appellee's Brief, *supra* note 74, at iii-iv.
77. *See supra* text accompanying notes 53-67.

vits than they do when they only have to prove there is no genuine issue of material fact on their own claims. Thus, when a plaintiff believes there is no genuine issue of fact and wishes to move for summary judgment, the burden established in *Holstine* requires the plaintiff to spend significantly more time and money investigating the defendant's alleged affirmative defenses. The plaintiff will have to collect depositions, admissions, stipulations, and affidavits not only on its own claim, but also on the opposing party's claim. Since the purpose of summary judgment is to avoid the cost and time of a trial when a claim is insufficient, it is counterproductive to put this burden, requiring more time and expense, on the plaintiff.[78]

Since the plaintiff is not the party asserting the affirmative defense, the plaintiff will rarely be well situated to know exactly who and what to seek out while it is collecting evidence for the record. On the other hand, the defendant, as the party asserting the defense, is always well situated to know exactly who can attest that an issue exists on that defense. Defendants assert affirmative defenses after carefully considering ways to prove them at trial and after developing a logical reasoning for their foundation. Plaintiffs will have to spend considerable time trying to calculate how defendants plan to prove their defenses and uncovering the reasoning behind those defenses. The courts have long recognized these inefficiencies by placing the burden of proof on defendants to prove their affirmative defenses at trial.[79] Simply put, it is unfair to put this burden on the plaintiff during summary judgment when the plaintiff would not have this burden of proof at trial.[80]

In addition, the very nature of what *Holstine* requires of a moving plaintiff will take a significant amount of time, if it is even possible.[81] Essentially, the plaintiff will have to prove a negative. Holstine's affirmative defense of fraud is a good illustration of the difficulty this standard presents. A plaintiff moving for summary judgment against a defendant who raises fraud as an affirmative defense will have to show there was no fraud. It would take considerably less time and resources for the defendant to present an affidavit or deposition

78. *See generally* Thomas Kallay, *Managing the Burdens Imposed on Motions for Summary Judgment in California: The 1992 and 1993 Amendments to CCP 437C*, 41 SANTA CLARA L. REV. 39 (2000) (noting how summary judgment saves the time and money of trial on insufficient claims).

79. *See, e.g.*, Porter v. Smith, 240 Neb. 928, 938, 486 N.W.2d 846, 853 (1992); Roan Eagle v. State, 237 Neb. 961, 968, 468 N.W.2d 382, 387-88 (1991); Georgetowne Ltd. P'ship v. Geotechnical Servs., Inc., 230 Neb. 22, 25, 430 N.W.2d 34, 37 (1988).

80. Kallay, *supra* note 78, at 59.

81. Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 498 (1997) (stating that the "burden to negate an essential element of [nonmovant's] case [is] too difficult to meet in most situations").

enumerating exactly what was fraudulent. The defendant is most familiar with the evidence supporting the affirmative defense and could present it more efficiently.

From the plaintiff's perspective, it is very difficult to anticipate what cards the defense is holding, and then present evidence that those cards do not in fact exist. It is established among attorneys that movants will not succeed in a motion for summary judgment if they are required to negate part of the nonmovant's claim.[82] This standard is too difficult for a movant to reach.[83] Overall, scholars and legislators have recognized that it is unfavorable to the concept of summary judgment to require a moving plaintiff to show that the nonmoving defendant does not have evidence supporting its defense.[84]

In addition to the needless time and money this burden will cost plaintiffs, it will cost the courts valuable judicial resources. The plaintiff will have to spend time taking and piecing together numerous depositions in order to show there are no issues for trial on the affirmative defenses. This will create an excessive amount of documents for the court to examine in determining if summary judgment should be granted. While this is being done, the defendant could have presented the same evidence both more efficiently and concisely. Since the defendant knows exactly what evidence supports its alleged affirmative defense, the defendant could clearly present it to the court. In addition to being clearer, the documentation presented to the court would be condensed. Nevertheless, the time of the judges in Nebraska will be needlessly wasted as a result of the *Holstine* decision. Overall, it is an inefficient process, which goes against the norm that "procedural rules should provide just results efficiently and economically."[85]

The second category of policy implications deals with the increase in frivolous litigation and the potential elimination of summary judgment. The standard set forth in *Holstine* puts defendants in a position where they can assert affirmative defenses to preclude a plaintiff's summary judgment motion. Essentially, a defendant can plead an affirmative defense to create an issue of fact that the plaintiff is not capable of disproving. Thus, the plaintiff could not successfully move for summary judgment because the issue of fact presented by the affirmative defense is one the plaintiff cannot show does not exist. In essence, a good defense becomes a great offense for defendants.

Raising numerous affirmative defenses, such as laches, estoppel, waiver, and equitable tolling, is not difficult for a defendant to do in its answer. Under the standard set in *Holstine*, defendants who raise as many of these affirmative defenses as possible will likely avoid having

82. Koppel, *supra* note 81, at 498.
83. *Id.*
84. Kallay, *supra* note 78, at 57.
85. Koppel, *supra* note 81, at 489.

summary judgment entered against them. Plaintiffs moving for summary judgment will have the virtually impossible task of showing no genuine issue of material fact exists on each of the affirmative defenses raised by the defendant. Thus, the *Holstine* decision set a standard that defense attorneys can use to avoid having summary judgment entered against their clients by simply raising numerous affirmative defenses.

The purpose of summary judgment is to pierce sham pleadings,[86] but the *Holstine* rule seems to encourage the very behavior summary judgment is meant to avoid. Ethical implications and sanctions aside, *Holstine* provides some very tempting options. Defense attorneys with sympathetic clients can use the *Holstine* decision as a means of ensuring plaintiffs will not be granted summary judgment and their clients will get in front of a jury. Defense attorneys will be able to look to Holstine, a defendant who merely pled an affirmative defense without presenting any evidence on it, as a model for avoiding a plaintiff's motion for summary judgment. Therefore, from a policy perspective, this decision carries with it some grave concerns for litigators in Nebraska.

D. Other Jurisdictions

The approaches other jurisdictions have taken with this type of procedural situation provide further insight into the *Holstine* decision. In order to understand how Nebraska fits into the larger trend, three points should be considered. First, the approach taken by the federal courts is crucial since Nebraska summary judgment law is based on the Federal Rules of Civil Procedure.[87] Second, the approach of the states within the Eighth Circuit provides a backdrop for how Nebraska compares with other states. Finally, the approach taken by the Texas courts provides the ideal way to deal with this type of procedural situation.

First, the approach taken by the federal courts is important in evaluating *Holstine*. Nebraska summary judgment law is based on federal summary judgment law, specifically Federal Rule of Civil Procedure 56.[88] Nebraska courts have looked to interpretations of Rule 56 for guidance in interpreting Nebraska summary judgment law.[89] Thus, the interpretation of Rule 56 by federal courts is relevant to understanding summary judgment in Nebraska.

The United States Supreme Court clarified many issues on the burden of proof in Rule 56 summary judgment motions in *Celotex*

86. *See supra* text accompanying note 3.

87. Illian v. McManaman, 156 Neb. 12, 17, 54 N.W.2d 244, 248 (1952).

88. *Id.*; FED. R. CIV. P. 56.

89. *See, e.g.*, Dennis v. Berens, 156 Neb. 41, 43, 54 N.W.2d 259, 261 (1952).

Corp. v. Catrett.[90] In *Celotex*, the Court made two important statements regarding the movant's burden of proof.[91] First, the Court held Rule 56 does not require "the moving party [to] support its motion with affidavits or other similar materials *negating* the opponent's claim."[92] While a movant can present evidence that would negate a nonmovant's defense, it is not required.[93] This is completely the opposite of what the court in *Holstine* required. In *Holstine*, the court denied the Bank summary judgment for failing to show Holstine's affirmative defenses did not raise an issue of fact.[94] Essentially, what the court was asking of the Bank would require negating Holstine's affirmative defenses. Thus, the Nebraska Supreme Court set a standard in opposition with the United States Supreme Court.

Second, the Court in *Celotex* held the moving party did not have a burden "to produce evidence showing the absence of a genuine issue of material fact . . . with respect to an issue on which the nonmoving party bears the burden of proof."[95] The Court went on to state the moving party can simply point out "that there is an absence of evidence to support the nonmoving party's case."[96] In other words, the movant is not required to produce evidence on issues the nonmovant carries the burden of proof on at trial. For the purpose of the summary judgment motion, the movant just has to tell the court there is no evidence on those issues in order to shift the burden.

Again, this is opposite of the court's holding in *Holstine*. A defendant bears the burden of proof at trial on affirmative defenses.[97] The court in *Holstine* denied the Bank summary judgment because of the Bank's failure to produce evidence on the affirmative defenses.[98] This is exactly what the Court in *Celotex* said is not required of the movant. Because the court in *Holstine* was so adamant in their stance requiring the Bank to produce this evidence even though the Bank specifi-

90. 477 U.S. 317 (1986). *Celotex* was decided the same year as two other important United States Supreme Court cases addressing Rule 56 issues: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Although the three cases are usually cited together when Rule 56 discussions emerge, only *Celotex* is relevant to the discussion at hand.

91. While the movant in *Celotex* was a defendant, this discussion of the case shows the propositions of law given by the Court are broad enough to apply to a case like *Holstine*.

92. 477 U.S. at 323.

93. 11 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.13[1] (3d ed. 1997) (stating that "[i]f the movant has information which would negate an essential element of the nonmovant's case or would nullify a defense, this can be included in a summary judgment motion" but it is not required).

94. 260 Neb. at 584-85, 618 N.W.2d at 709.

95. 477 U.S. at 325.

96. *Id.*

97. *See* cases cited *supra* note 79.

98. 260 Neb. at 584-85, 618 N.W.2d at 709.

cally denied the affirmative defenses, it is unlikely the court would have been satisfied with the Bank merely pointing out there was no evidence on the affirmative defenses. Therefore, the court in *Holstine* went against the widely recognized standard set forth in *Celotex*.[99]

Second, the way other states deal with this issue provides a comparison for how *Holstine* fits into the larger trend. States within the Eighth Circuit provide a good backdrop for this comparison because they show the diversity in positions taken on this issue. These positions fall into three general categories. First, there are states that take a position inconsistent with *Holstine*, following a standard similar to that established by the United States Supreme Court in *Celotex*.[100] Second, there are states that do not have clearly developed law in this area.[101] Third, there are states that take the same approach as that taken by the court in *Holstine*.[102]

The first category includes states that do not follow the standard set in *Holstine*. In Minnesota and Arkansas, the moving plaintiff does not have the burden to present evidence on affirmative defenses. Minnesota case law implies that when a plaintiff moves for summary judgment, the defendant then has to present evidence on the affirmative defenses.[103] Under Arkansas case law, when a plaintiff moves for summary judgment, a defendant with an affirmative defense responds by producing evidence on the affirmative defense.[104] The standard set in Minnesota and Arkansas is distinguishable from that set in *Holstine*. Minnesota and Arkansas require the nonmoving defendant to present evidence on the affirmative defenses, while *Holstine* puts this burden on the plaintiff.[105]

The second category includes states that have undeveloped law in this area. Both South Dakota and Iowa do not have a clear standard for a plaintiff moving for summary judgment against a defendant with an affirmative defense. South Dakota law is mostly limited to cases where defendants moved for summary judgment on the basis of affirmative defenses.[106] The South Dakota case law that does involve a

99. *See* 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2727 (3d ed. 1998) (discussing the impact of *Celotex*); *see also* MOORE, *supra* note 93, § 56.13[1] (discussing the movant's burden of proof in Rule 56 summary judgment motions).

100. *See infra* text accompanying notes 103-05.

101. *See infra* text accompanying notes 106-11.

102. *See infra* text accompanying notes 112-15.

103. *See* Indep. Sch. Dist. No. 197 v. Accident and Cas. Ins. of Winterthur, 525 N.W.2d 600, 606 (Minn. Ct. App. 1995); *see also* Stubblefield v. Gruenberg, 426 N.W.2d 912 (Minn. Ct. App. 1988) (involving plaintiff who moved for summary judgment against a defendant with an affirmative defense).

104. *See* Cavaliere v. Skelton, 40 S.W.3d 844, 848-49 (Ark. Ct. App. 2001).

105. *Holstine*, 260 Neb. at 584-85, 618 N.W.2d at 709.

106. *See* Ray v. Downes, 576 N.W.2d 896 (S.D. 1998); Cody v. Leapley, 476 N.W.2d 257 (S.D. 1991); Barger v. Cox, 372 N.W.2d 161 (S.D. 1985).

moving plaintiff does not address the burden of proof on the affirmative defenses.[107] Iowa law is also not clearly developed on this issue. In *American Telephone & Telegraph Co. v. Dubuque Communications*,[108] the plaintiff's documents supporting its summary judgment motion stated a belief the defenses were nonexistent. While this is consistent with the standard the United States Supreme Court later set in *Celotex*,[109] the court in *Dubuque* did not specify this as a requirement.[110] Thus, *Dubuque* does not make a clear declaration of the standard in Iowa.[111] Overall, the law on this issue in South Dakota and Iowa is uncertain.

The third category includes states that follow a standard like the one set in *Holstine*. Both Missouri and North Dakota fall into this category. Missouri has taken a clear position:

> [W]here the non-movant has raised an affirmative defense, as in the present case, the movant's right to summary judgment on his or her claim depends just as much on the nonviability of the non-movant's affirmative defense as it does on the viability of the movant's claim. . . . It does not matter that the non-movant will bear the burden of persuasion on the affirmative defense at trial.[112]

In Missouri, a plaintiff has the burden to establish the affirmative defense does not raise a genuine issue of material fact.[113] In other words, the plaintiff must negate the defendant's affirmative defenses in order to succeed in a summary judgment motion.

In North Dakota, a plaintiff will not succeed on a motion for summary judgment if it does not address the defendant's affirmative defenses.[114] The moving plaintiff does not meet its burden unless it clearly shows an issue of fact does not exist on the affirmative defenses.[115] Thus, Missouri and North Dakota put the burden on the moving plaintiff to show the affirmative defenses do not create an is-

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107. *See* Brown County Coop. Assoc. v. Rasmussen-King Cattle Corp., Inc., 300 N.W.2d 265, 270 (S.D. 1980) (regarding the requirement that affirmative defenses be factually delineated).

108. 231 N.W.2d 12, 13 (Iowa 1975).

109. *See supra* text accompanying notes 90-99. The *Celotex* decision came over ten years after *Dubuque*.

110. *Dubuque*, 231 N.W.2d at 13-14.

111. There are additional cases exemplifying the uncertainty of Iowa law in this area. *See, e.g.*, Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422 (Iowa 1988) (involving affirmative defenses that did not affect the summary judgment motion); Davis v. Comito, 204 N.W.2d 607 (Iowa 1973) (involving defendant who testified in support of affirmative defenses but was not specified as having the burden of proof); Heishman v. Heishman, 367 N.W.2d 308 (Iowa Ct. App. 1985) (involving decision that did not clearly specify which party had the burden of proof on affirmative defenses).

112. Rodgers v. Threlkeld, 22 S.W.3d 706, 710 (Mo. Ct. App. 1999) (citation omitted).

113. *Id.* at 710.

114. Pioneer State Bank v. Johnsrud, 284 N.W.2d 292, 298 (N.D. 1979).

115. *Id.* at 298.

sue of fact. Since *Holstine* denied the plaintiff summary judgment for failure to present evidence on the affirmative defenses, it is consistent with the standard in Missouri and North Dakota.

Overall, there is great diversity among the states on this procedural issue. The states within the Eighth Circuit exemplify the different approaches states have taken. While *Holstine* is consistent with some states, it is inconsistent with others. In all, the standard in Minnesota and Arkansas, coupled with the United States Supreme Court's holding in *Celotex*, shows the Nebraska Supreme Court had a favorable and widely accepted alternative to their decision in *Holstine*.

Finally, the approach of the Texas courts provides the most efficient way to deal with this procedural situation. The benefits of the Texas standard, such as quick disposal of sham pleadings, parallel the problems created by the *Holstine* decision.[116] In Texas, when plaintiffs move for summary judgment against defendants who have raised affirmative defenses, the plaintiff does not have to produce evidence on the affirmative defenses.[117] This standard is best expressed in the court's own words:

> Where the plaintiff moves for summary judgment in an action in which the defendant has pleaded an affirmative defense, he is entitled to have his summary judgment if he demonstrates by evidence that there is no material factual issue upon the elements of his claim, unless his opponent comes forward with a showing that there is such a disputed fact issue upon the affirmative defense.[118]

The standard set forth in Texas puts the burden of showing the existence of issues of fact on the defendant, who is the party asserting and most familiar with the logic behind their own affirmative defenses.[119] Defendants have to clearly and quickly assert what issues of fact exist due to their affirmative defenses or summary judgment will be granted against them, assuming plaintiffs have met their burden. Sham pleadings by defendants will be quickly disposed of, if not completely avoided. This is because defendants clearly have the burden of producing evidence on their affirmative defenses during summary judgment motions, which usually take place early in the litigation. Thus, it effectuates the purpose of summary judgment by quickly and efficiently disposing of sham pleadings and unnecessary litigation. As noted earlier, some of the policy problems created by *Holstine* are inefficient litigation and frivolous lawsuits.[120] The very

116. *See supra* text accompanying notes 78-86.

117. *See, e.g.*, Seale v. Nichols, 505 S.W.2d 251 (Tex. 1974); Taylor v. Fred Clark Felt Co., 567 S.W.2d 863 (Tex. Civ. App. 1978).

118. *Seale*, 505 S.W.2d at 254 (quoting Gulf, Colo. & Santa Fe Ry. v. McBride, 322 S.W.2d 492, 500 (Tex. 1959)).

119. See *Rucker v. Bank One Tex.*, 36 S.W.3d 649 (Tex. App. 2000) for a recent Texas case addressing this issue.

120. *See supra* text accompanying notes 78-86.

benefits of the Texas standard avoid these problems. Thus, Texas has the most efficient standard.

In all, the approaches taken by the federal courts, other states in the Eighth Circuit, and Texas reveal the decision in *Holstine* was not completely without precedent. At the same time, it breaks from the federal standard clearly defined by the United States Supreme Court. Also, the approach taken by some jurisdictions is more logical and efficient than the standard set in *Holstine*. Even though there is some precedent in other jurisdictions for the *Holstine* decision, the decision is still not justified. The weight of the precedent and the relationship between Nebraska and federal summary judgment law favor a holding opposite of that rendered in *Holstine*.

IV. CONCLUSION

Holstine changed Nebraska summary judgment law by giving moving plaintiffs the burden to disprove defendants' affirmative defenses. *Holstine* should have been decided differently for many reasons. The decision contradicted prior case law and misconstrued cases throughout the analysis. *Holstine* will also lead to frivolous litigation and great inefficiencies. In addition, other jurisdictions provide favorable alternatives to the standard set in *Holstine*.

Holstine provides a warning to Nebraska attorneys that the court has engaged in an unprecedented change in the law. Making assertions of law that are not founded on previous Nebraska law, yet not overruling conflicting cases, results in an inconsistency that renders the court's reasoning quite questionable. It raises an inference that the court is making its decisions based on feelings towards the parties, rather than the authority of Nebraska law.

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